Coleman qualified in 1893, and the executors of John T. Coleman qualified in 1892, neither of these fiduciaries made any settlement of their accounts, as required by statute, until compelled to do in this cause, which was instituted by the appellees in 1899; and no reasonable or sufficient excuse has been offered for their failure to perform this plain and mandatory duty. Code, §§ 2678, 2679.

We are further of opinion that there is no merit in the cross-errors assigned by the appellees. That the amount involved gives this court jurisdiction in the premises clearly appears from the record. The action of the court in holding that W. J. Coleman had an insurable interest in his father's life has already been disposed of and need not be further considered.

No sufficient ground is shown for the contention of appellees that the court erred in charging them with $500 which appears to have been due from their father to the estate of their grandfather, John T. Coleman.

Upon the whole case, we are of opinion that the decree complained of must be affirmed.

Affirmed.

PROVIDENCE FORGE FISHING & HUNTING CLUB, Inc., *v.* MILLER MFG. CO., Inc., et al.

Jan. 12, 1915.

[83 S. E. 1047.]

1. Waters and Water Courses (§ 111*)—Riparian Owner—Boundaries.—An owner of land adjoining an inland fresh-water lake or pond, or an artificial pond created by damming an ordinary stream, takes to the center, though the rule does not apply to the great navigable lakes.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 114, 121, 122; Dec. Dig. § 111.*]

2. Boundaries (§ 14*)—Waters and Water Courses—Construction of Deed.—A deed describing land as bounded on the east by the "Providence Forge mill pond" did not exclude any part of the pond from the conveyance, but the grantee took to the center.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. §§ 102-107; Dec. Dig. § 14.*]

3. Adverse Possession (§ 60*)—Requisites—Hostile Possession.—The acts of an owner of land adjoining a fresh-water pond in

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

fishing and hunting on the pond, and in renting boats to others for use on the pond, and a predecessor's instruction to his agent not to permit any one else to boat or fish on the pond without his permission, were not inconsistent with, or hostile to, the rights of other adjoining owners using the pond for boating and fishing when they desired to do so, and hence created no title by adverse possession.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 282-312, 323, 328; Dec. Dig. § 60.*]

4. Adverse Possession (§ 38*)—Requisites—Exclusive Possession.—Such acts did not indicate an intention to appropriate land, but only its products, and did not constitute an exclusive possession, and hence created no title by adverse possession.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. § 147; Dec. Dig. § 38.*]

5. Appeal and Error (§ 1073*)—Harmless Error—Decree.—On a bill to remove an alleged cloud from title to real estate, a decree fixing the middle of a pond as the boundary line, if erroneous, was to the advantage of the plaintiff, and hence he could not complain thereof.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4240-4247; Dec. Dig. § 1073.*]

Appeal from Chancery Court of Richmond.

Bill by the Providence Forge Fishing & Hunting Club, Incorporated, against the Miller Manufacturing Company, Incorporated, and others. Decree for defendants, and plaintiff appeals. Affirmed.

John A. Lamb, S. A. Anderson, and *Brockenbrough Lamb,* all of Richmond, for appellant.

S. O. Bland, of Newport News, for appellees.

HARRISON, J. The bill in this cause, which was filed by the appellant, Fishing and Hunting Club, seeks to have removed an alleged cloud from its title to certain real estate, and to that end to have rescinded and annulled a certain deed dated February 16, 1911, from Amelia Binns Stringfellow and others to the appellee the Miller Manufacturing Company, Incorporated.

The controversy inaugurated by this proceeding involves the title to an artificial pond approximately one mile and a quarter long and a quarter of a mile wide, formed by the damming of a natural stream. This pond has existed for many years, and is connected with a gristmill located at the southern extremity of the pond. A number of streams run into the pond, or Mirror Lake, as it is sometimes called, chief among them being Rum-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

nor's stream, which is seven or eight miles long and enters the pond at its northern end. Adjoining the pond on the easterly side are the properties of the appellant, formerly known as "Providence Forge," and the property of one Falstrom. Adjoining the pond on the west is the property of the Binnses, appellees, known now as Pearson's, and the "Sycamore Springs" property. Appellant claims the entire pond—the water, the soil under the water, all the trees in the pond, the sole right of fishing in the pond, all rights of property therein, and all land on both sides of the pond which would be under water if the water of the pond were raised to a level with the height of the dam.

Appellees insist that the decree of the chancery court of the city of Richmond should be affirmed, holding that a line extending through the center of the pond is the dividing line between the lands of the contestants, the appellees claiming to said center line the water in the pond, the soil under the water, the trees in the water, the exclusive right of fishing, and all other property rights, except the right to interfere with the use of the water for mill purposes.

[1] Authority of the highest character is abundant that an adjoining landowner on an inland fresh-water lake or pond takes to the center; the same rules applying in such cases as apply in cases of streams. Of course, the rule does not apply to the great navigable lakes to which all those reasons apply which apply to the sea itself. Hardin *v.* Jordan, 140 U. S. 371, 11 Sup. Ct. 808, 35 L. Ed. 428. A fortiori is it true that the adjoining landowner will take to the center of an artificial pond, like that under consideration, which is created by damming an ordinary stream, unless he has excluded himself from such right by deed or contract.

[2] In Farnham on Waters, § 869, the author says:

"The rules with respect to boundaries upon artificial ponds are very similar to those governing boundaries on the streams on which the ponds are raised. If the pond is created by the damming back of the water of a natural stream, a conveyance of land bounded by it will extend as far as the title of the grantor extends. If his title extends to the center, the grantee will acquire title to that point, but, if only to the edge, the deed will, of course, carry title no further. It makes no difference that the ordinary terms of boundary, as 'along' or 'with' the pond, are used; the title will nevertheless go to the center if the grantee owns to that point. And the age of the pond is immaterial. * * * If there is a desire to exclude the pond from the grant, it may be done by appropriate language, the same as in the case of streams. In the absence of express exclusion, every reason which has led to the establishment of the rule that boundary on a stream will carry title to the center would seem to apply in case of boundary on a pond formed by artificial expansion of the stream."

There is nothing in the record before us to justify the conclusion, insisted upon by the appellant, that the appellees or their predecessors in title have excluded themselves from their common-law right to the center of the pond in question, as the boundary line between themselves and the appellant.

The appellant insists that the appellees are bound by the description of their property contained in the deed dated November 4, 1892, from their predecessor in title, which describes their land as bounded on the east by the "Providence Forge mill pond," thereby, it is contended, excluding any part of the pond from the conveyance. This contention cannot be sustained. The language relied on is not an express exclusion of the grantees' right to the middle of the pond. As said in Farnham on Waters, supra:

"It makes no difference that the ordinary terms of boundary, as 'along' or 'with' the pond, are used; the title will nevertheless go to the center if the grantor owns to that point."

It would seem to be a sufficient answer to this contention that by the same process of reasoning the appellant would also be excluded from any right or title in the pond because by deed dated February 1, 1868, its predecessor in title describes the land now held by it as bounded on the west by the mill tail and millpond; and reference is expressly made in other deeds in its chain of title to this description.

[3, 4] Appellant further insists that it has acquired title to the whole of this pond by adverse possession for the statutory period. The record wholly fails to show any actual possession of this body of water by any one. The acts of ownership relied upon are fishing and hunting, chiefly by the Townsends, the predecessors in title of the appellant, the renting of boats by the Townsends to others for use on the pond, instructions by the Townsends to their agents not to permit any one else to boat or fish on the pond without their permission, etc. These acts were not inconsistent with the rights of the appellees, who, together with others, are also shown to have used the pond for boating and fishing when they desired to do so. The predecessors in title of the appellees, so far as the record shows, had an equal right with the Townsends to charge people for boating and fishing, if they had chosen to exercise that right. Such acts as are relied on here by appellant do not indicate and serve notice of an intention to appropriate the land itself, but only to appropriate the products of it to the dominion and ownership of the Townsends, which is not sufficient. The occupancy necessary to create title by adverse possession must be hostile and exclusive. The acts testified to in the case before us were neither. Austin *v.* Minor, 107 Va. 101, 57 S. E. 609; Gardner *v.* Montague, 108

Va. 192, 60 S. E. 870; Whealton *v.* Doughty, 112 Va. 649, 72 S. E. 112.

That the appellant has title to the pond by prescription, as suggested in the petition for appeal, has not been pressed before this court, and there is nothing in the facts of record to sustain the suggestion.

[5] Appellant makes the point that, if the thread of the stream should be the boundary, it has been injured by the decree of the lower court, which fixes the middle of the pond as the boundary line. If the decree is erroneous in the particular mentioned, as to which we express no opinion, it is to the prejudice of the appellees, and greatly to the advantage of the appellant. The evidence is uncontradicted that most of the channel of the stream is on appellant's side of the pond. This being so, the appellees, who are not complaining, are the sufferers by the decree, and not the appellant.

Upon the whole case, we are of opinion that there is no error in the decree appealed from the prejudice of the appellant, and it must be affirmed.

Affirmed.

TROWER *v.* SPADY et al.

Jan. 12, 1915.

[83 S. E. 1049.]

1. Wills (§ 778*)—Construction—Election.—Where testatrix devised her farm in equal moieties to her two daughters, and after one of them died executed a codicil authorizing the survivor to take the whole upon payment of $5,000 to the heirs of the deceased, the courts, whether the provision be regarded as a devise or merely an option, cannot prevent the survivor from electing to take the whole, merely because the land had appreciated in value and the interest was worth considerably more than the charge, for the right to dispose of one's estate in accordance with one's own wishes should not be interfered with by a chancery court.

]Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 2004, 2006, 2010; Dec. Dig. § 778.*]

2. Wills (§ 786*)—Interest Devised—Election—Insane Persons.—Infants and insane persons are wards of the court, and where an insane person was given an election to take a parcel of land on payment of charges a court of equity should not deny her committee

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.